BANK UTAMA (MALAYSIA) BHD

v.

PERIAMMA VELLASAMY

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
[ORIGINATING SUMMONS NO: S6(S2)-24-1611-2000]
20 AUGUST 2002

LAND LAW: *Caveat - Private caveat - Application for removal - National Land Code, s. 327 - Test to be applied - Whether caveatable interest existed - Whether there were serious questions to be tried - Balance of convenience - Whether in favour of caveator*

The vendors, one Sundra Moorthy and Shanti, had purchased a flat ('the said property') and obtained a loan from the plaintiff bank through a loan agreement to settle the balance of the purchase price of the said property. Subsequently, the defendant sought to purchase the said property from the vendors and entered into a sale and purchase agreement with them to such effect. The defendant then entered a private caveat over the said property. An action was filed in the High Court by the defendant for specific performance of the sale and purchase agreement when the vendors failed to complete the said agreement. Later, the plaintiff decided to terminate the loan agreement with the vendors on the premise of a breach. They attempted to register a legal charge over the said property but failed due to the existence of the defendant's caveat. They applied to this court to remove the said caveat under s. 327 of the National Land Code ('NLC').

Held:

[1] The Court of Appeal in *Luggage Distributors* laid out a three-stage test in considering an application to remove a caveat under s. 327 of the NLC. Firstly, that the caveator had a caveatable interest in the said property; secondly, that there was serious question to be tried; and thirdly, that on a balance of convenience, it would be better to maintain the *status quo* until the disposal of the action. (p 145 c-e)

[2] The defendant had a caveatable interest over the said property in light of the existence of the sale and purchase agreement, the deposit paid, the action for specific performance and, that she was able and willing to complete the purchase of the said property from the vendors. (p 145 f-h)

[3] The defendant had proven that there was a serious question to be tried based on the facts and that the defendant's action for specific performance involved the same property which the plaintiff's present action was based upon. (p 146 a-b)

[4] The plaintiff was mainly interested in getting the outstanding debt owed to them by the vendors whereas the defendant was genuinely interested in owning the said property. There was a great likelihood of the vendors' debt to the plaintiff being settled should the sale of the said property go through. However, removing the caveat would possibly involve the said property being sold to someone else thereby causing irreparable damage by depriving the defendant from seeking her legitimate claim to own the said property. Therefore, the balance of convenience would certainly be in the defendant's favour to allow the *status quo* to remain. (p 146 d-f)

[Application for removal of caveat dismissed with costs.]

Case(s) referred to:
Eng Mee Yong v. Letchumanan [1979] 2 MLJ 212 ***(foll)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 2 CLJ 713 ***(foll)***

Legislation referred to:
National Land Code, s. 327

For the plaintiff - SS Tan; M/s Wong Lu Peen & Tunku Alina
For the defendant - Robert Low (CK Yeoh); M/s Ranjit Ooi & Robert Low

Reported by M Maheswaran

JUDGMENT

Azmel Maamor J:
The plaintiff in this case applied under s. 327 of the National Land Code 1965 for an order to remove the private caveat entered by the defendant in respect of a flat held under Suratan Hakmilik PN6204/M2/1/5 Lot No. 17895, Mukim Setapak, Wilayah Persekutuan (the said property). The brief facts of the case are as follows.

By a sale and purchase agreement dated 29 November 1985 Sundra Moorthy Rengathuri and Shanti a/p Kanapiah (vendors) had purchased the said property from Projek Genting Kelang Sdn. Bhd. at the price of RM37,000. In order to settle the payment of the purchase price the vendors obtained housing loan from Bank Utama (Malaysia) Bhd. (the plaintiff) for the amount of RM33,300. A loan agreement between the vendors and the plaintiff was signed on 3 September 1988. Part of the terms of the loan agreement stated:

(i) as security for the loan, pending issuance of the strata title to the said property, the vendors shall assign all their rights, title and interest under the sale and purchase agreement aforesaid together with rights and interest to the said property to the plaintiff (cl. 6.1);

(ii) upon issuance of the strata title to the said property, the vendors shall transfer and register the said property in their names and at the same time, execute a first legal charge on the strata title in favour of the plaintiff to secure the payment of this loan (cl. 6.3); and

(iii) should the vendors breach the loan agreement, the plaintiff is entitled to sell the said property in such manner as the plaintiff deems fit at a price not less than the estimated market value of the said property (cl. 11.2).

On 3 September 1988 the vendors executed a deed of assignment in which the vendors assigned all their rights, title and benefit in and to the said property under the sale and purchase agreement to the plaintiff. The vendors also undertook to transfer and register the said property in their names and at the same time, execute a first legal charge on the strata title in favour of the plaintiff, upon the issuance of the strata title to the said property. On 28 March 1989 the strata title to the said property was issued by the relevant authorities.

On 5 July 1994 the defendant entered into a sale and purchase agreement with the vendors for the purchase of the said property at the price of RM58,000. A sum of RM11,600 was paid by the defendant to the vendors upon signing the sale and purchase agreement. In order to secure her interest over the said property the defendant entered a private caveat on the strata title of the said property on 11 February 1995. Subsequently, on 17 September 1996 the defendant entered another private caveat since the earlier caveat had expired.

On 4 February 1997 the defendant filed an action in the Kuala Lumpur High Court (Civil Suit No: S4-22-66-97) seeking for specific performance of the sale and purchase agreement against the vendors for failure to complete the sale of the said property to the defendant.

On 25 June 1999 because the vendors had breached the terms of the loan agreement the plaintiff decided to terminate it. At this time no charge had been registered on the strata title of the said property in favour of the plaintiff. On 20 July 1999 the plaintiff's attempt to register a legal charge over the said property had failed because of the existence of the private caveat entered by the defendant. Hence this application was filed by the plaintiff against the defendant for the removal of the private caveat entered by the defendant.

The principle to be followed in an application for the removal of a caveat pursuant to s. 327 of the National Land Code 1965 had been clearly laid down in the Privy Council case of *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212 where Lord Diplock, in delivering the decision of the Privy Council said:

> This is the nature of the onus that lies upon the caveator in an application by the caveatee under section 327 for removal of a caveat: he must first satisfy the court on the evidence presented to it his claims to an interest in the property does raise a serious question to be tried: and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

Subsequently, the Court of Appeal in the case of *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng & Anor* [1995] 2 CLJ 713, set out the three stages a court should take in dealing with an application for removal of caveat, as follows:

(i) That the Defendant (caveator) had a caveatable interest in the said Property;

(ii) That there is a serious question to be tried; and

(iii) That on the balance of convenience it would be better to maintain the *status quo* until the disposal of the action.

I propose to examine the plaintiff's application in the light of the principle as laid down by the *Luggage Distributors* case *(supra)*.

Caveatable Interest

In respect of this 1st stage the defendant contended that she had entered into a sale and purchase agreement with the vendors, in respect of the said property. And a sum of RM11,600 equivalent to (20% of the purchase price) had been paid to the vendors upon the signing of the said agreement. Subsequently, the defendant had also filed an action against the vendors seeking for specific performance of the sale of the said property. The defendant was able and willing to complete the purchase of the said property from the vendors. In the light of the above circumstances I was quite satisfied that the defendant had shown to the court that she had caveatable interest in respect of the said property.

Serious Question To Be Tried

On the facts of this case I was quite satisfied that the defendant was a person who was claiming title to or registrable interest in the said property by virtue of the fact that she had entered into a sale and purchase agreement with the vendors and a sum equivalent to 20% of the purchase price had been paid.

The defendant had brought an action for specific performance against the vendors seeking the completion of the purchase of the said property. The defendant was at all time able ready and willing to complete the purchase of the said property. Even though the defendant's legal action did not involve the plaintiff directly but the subject matter of the action involved the same property over which the defendant had entered a caveat which the plaintiff applied to remove so that the plaintiff can sell it. Whose right should prevail? In the light of such circumstances I was quite satisfied that the defendant had shown the existence of a serious question to be tried, thereby satisfying the existence of the 2nd stage of the test.

Balance Of Convenience

It is not disputed that the plaintiff's intention to have the defendant's caveat removed was only to facilitate the sale of the said property in order to settle the vendors' outstanding debt with the plaintiff. Here, the defendant was genuinely intending to purchase the said property from the vendors. It would appear to me that all that the plaintiff was interested was the payment of the vendors' outstanding debt. The plaintiff was not interested to own the said property. On the other hand the defendant was genuinely interested to own the said property. Upon the vendors' agreeing to complete the sale of the said property to the plaintiff there was great likelihood that from the amount of the balance purchase price the vendors' outstanding debt with the plaintiff could be fully settled. All the plaintiff needed to do was to ensure that the balance purchase price would be paid to the plaintiff and everybody would be happy. On the other hand to have the caveat removed there would be likelihood that the said property be disposed off to someone else thereby permanently depriving the defendant from seeking her legitimate claim to own the said property. Such being the circumstances of this case the balance of convenience would certainly be in favour of allowing the *status quo* to remain. To remove the caveat would cause irreparable damage to the defendant who contended that she had strong merits to own the said property. In the light of the above circumstances I was satisfied that the defendant had also shown the existence of the 3rd stage of the test.

After having considered the whole circumstances of this case and after being satisfied that the defendants had proved the existence of the three stages of test as laid down in the Court of Appeal case of *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng & Anor* [1995] 2 CLJ 713, I arrived at the conclusion that the plaintiff's application for the removal of the caveat be dismissed with costs. And I so ordered.